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A Departure from Benevolent Neutrality - Decker v. O'Donnell

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A DEPARTURE FROM BENEVOLENT NEUTRALITY— *DECKER V. O'DONNELL*

The establishment clause of the first amendment to the United States Constitution[1] has generated controversy in a variety of contexts,[2] although the majority of cases have concerned either the constitutional limitations imposed on public financial assistance to sectarian schools,[3] or the permissibility of prayer in public schools.[4] In the last three decades,[5] the United States Supreme Court has struggled to articulate principled guidelines to govern establishment clause analysis in all areas in which the issue has arisen.[6]

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1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I. The religion clause of the first amendment comprises two parts: the establishment clause prohibits the state from promoting religion and the free exercise clause prohibits the state from inhibiting religion.

2. *See, e.g.*, Harris v. McRae, 448 U.S. 297 (1980) (denial of funds for medically necessary abortions challenged as violative of first amendment); Gillette v. United States, 401 U.S. 437 (1971) (conscientious objector exemption from military service challenged as violative of the establishment clause); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (constitutional challenge to property tax exemptions for religious organizations); Braunfeld v. Brown, 366 U.S. 599 (1961) (first amendment challenge to statute proscribing the retail sale of certain commodities on Sunday); McGowan v. Maryland, 366 U.S. 420 (1961) (establishment clause challenge to Sunday closing laws); Torcaso v. Watkins, 367 U.S. 488 (1961) (establishment clause challenge to requirement of belief in God for notary public commission).

3. Since 1947, the Supreme Court has handed down nine major decisions concerning public financial assistance to parochial schools. *See* Committee for Pub. Educ. & Relig. Liberty v. Regan, 444 U.S. 646 (1980); Wolman v. Walter, 433 U.S. 229 (1977); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976); Meek v. Pittenger, 421 U.S. 349 (1975); Committee for Pub. Educ. & Relig. Liberty v. Nyquist, 413 U.S. 756 (1973); Tilton v. Richardson, 403 U.S. 672 (1971); Lemon v. Kurtzman, 403 U.S. 602 (1971); Board of Educ. v. Allen, 392 U.S. 236 (1968); Everson v. Board of Educ., 330 U.S. 1 (1947). For a summary of the holdings and rationales in these cases, see notes 12-46 and accompanying text *infra*.

4. The Supreme Court's pronouncements on the issue of prayer in public schools are contained in four major post-1947 decisions. *See* Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962); Zorach v. Clausen, 343 U.S. 306 (1952); Illinois *ex rel* McCollum v. Board of Educ., 333 U.S. 203 (1948). For a summary of the holdings and rationales in these cases, see notes 12-46 and accompanying text *infra*.

5. Although the first amendment was ratified in 1791, the Supreme Court did not resolve an establishment clause controversy until 1947 in Everson v. Board of Educ., 330 U.S. 1 (1947). There are three major reasons why no establishment clause litigation was initiated before 1947. First, many state constitutions contained more specific provisions prohibiting expenditure of state funds for religious purposes than does the federal constitution. Second, the establishment clause was not held applicable to the states until the *Everson* decision. Finally, taxpayers challenging the expenditure of tax-raised funds had difficulty obtaining standing to sue. *See* R. FLOWERS & R. MILLER, TOWARD BENEVOLENT NEUTRALITY 298 (1977) [hereinafter cited as TOWARD BENEVOLENT NEUTRALITY]. In Flast v. Cohen, 392 U.S. 83 (1968), however, the Supreme Court lowered the barrier against taxpayer suits challenging federal expenditures as violations of the establishment clause.

6. Notwithstanding the efforts of the Supreme Court in formulating cogent, unified establishment clause standards, this area of constitutional law remains one of the most incomprehensi-

The principle of governmental neutrality[7] toward religion has emerged as the fundamental establishment clause objective that, together with the prohibitions of the free exercise clause, ensures the religious liberty of each citizen. Nevertheless, the Court has also recognized the internal tensions between the free exercise and establishment clauses; if either is extended to its limits, the freedoms guaranteed by the other are impaired.[8] Governmental hostility toward religion, for example, would jeopardize the guarantees of the free exercise clause. Similarly, governmental favoritism toward one religion, or toward religion over nonreligion, would violate the mandates of the establishment clause. Thus, the neutral course is a narrow one, with the evils of hostility and favoritism ever lurking on the sidelines.

In *Decker v. O'Donnell*,[9] the United States Court of Appeals for the Seventh Circuit was presented with a controversy unlike any decided by the Supreme Court. At issue in *Decker* was the constitutionality of the Comprehensive Employment Training Act,[10] which authorizes a general public welfare program designed to alleviate the problems of the unemployed. By sustaining the plaintiffs' challenge and denying religious organizations the right to participate in the program, the *Decker* court departed from the neutral course charted by the Supreme Court in establishment clause analysis, and raised serious questions concerning the role of religious organizations in the public service area.[11]

THE ESTABLISHMENT CLAUSE AND THE SUPREME COURT

Since its first encounter with an establishment clause controversy in *Board of Education v. Everson*,[12] the Supreme Court has experienced extreme

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ble and unpredictable. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (Burger, C.J.) ("Candor compels acknowledgement, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."); Walz v. Tax Comm'n, 397 U.S. 664, 694 (1970) (Harlan, J., concurring) ("[I]t is far easier to agree on the purpose that underlies the First Amendment's Establishment and Free Exercise Clauses than to obtain agreement on the standards that should govern their application."); Zorach v. Clauson, 343 U.S. 306, 325 (1952) (Jackson, J., dissenting) ("The wall which the Court was professing to erect between Church and State has become even more warped and twisted than I [had] expected."). *See also* Ellington, *The Principle of Political Nondivisiveness and the Constitutionality of Public Aid to Parochial Schools*, 5 GA. L. REV. 429, 434 (1971) ("Although cast in terse and absolute terms, [the establishment clause] has been far from simple to apply to concrete cases, and the opinions of the Justices have been notable for their lack of durability, their internal inconsistency, and their failure to adopt a single, unifying, cogent rationale.").

7. For an extended discussion of neutrality as the fundamental principle underlying establishment clause analysis, see notes 12-46 and accompanying text *infra*.

8. *See* notes 20-22 and accompanying text *infra*.

9. Nos. 80-1230, 1231 & 1264 (7th Cir. Sept. 9, 1980). *See* notes 71-90 and accompanying text *infra*.

10. Comprehensive Employment Training Act of 1973, Pub. L. No. 93-203, 87 Stat. 839 (codified at 29 U.S.C. §§ 801-999 (1976)). For a detailed discussion of the provisions of the Act, see notes 47-57 and accompanying text *infra*.

11. *See* notes 91-142 and accompanying text *infra*.

12. 330 U.S. 1 (1947).

difficulty in articulating the objectives of the establishment clause, in defining the relationship between the free exercise and establishment clauses, and, most conspicuously, in developing standards to govern establishment clause analysis in the myriad fact situations in which the issue arises.[13] The *Everson* decision illustrates one of the major obstacles that has plagued the Court—consistently identifying and applying fundamental establishment clause principles. Justice Black, writing for the *Everson* majority, expressed the objectives of the establishment clause using strict separationist language.[14] Notwithstanding this language, the Court upheld a state statute authorizing reimbursements to parents of parochial school children for bus transportation to and from school.[15] The Court stated that the establishment clause, though prohibiting direct aid to religious activities, did not prohibit the state from extending the benefits of its public welfare legislation[16] to all its citizens without regard to their religious affiliation, even though religious organizations may be indirectly benefited.[17]

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13. *See* note 2 *supra*.

14. In what is probably the most frequently quoted passage in establishment clause case law, Mr. Justice Black stated:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, . . . whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a "wall of separation between church and State."

330 U.S. at 15-16.

There are at least two basic approaches to interpretation of the establishment clause. One such approach is labeled the "accommodationist" position. This viewpoint argues that governmental aid to religion is constitutionally permissible if that aid is provided impartially among the various religious groups. *See* P. KURLAND, RELIGION AND THE LAW (1962). The other major approach, the "separationist" position, views the establishment clause as prohibiting state provision of aid to any religious group, regardless of the equity of apportionment. *See* L. PFEFFER, CHURCH, STATE, AND FREEDOM (rev. ed. 1967).

15. 330 U.S. at 18.

16. The *Everson* Court cited police and fire protection, connections for sewage disposal, public highways and sidewalks, as general public welfare services. *Id.* at 17. Public welfare legislation is designed to generate benefits to be shared in common by all members of a community, as opposed to legislation tailored to serve the interests of a more limited, specialized group.

17. Recognizing the interplay of the free exercise and establishment clauses, the Court stated that while the establishment clause prohibits a state from contributing to the support of a religious organization, nevertheless "[the state] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." *Id.* at 16 (emphasis in original).

Despite the strict separationist language in *Everson*, the Supreme Court has since recognized that complete separation of church and state is neither mandated by the establishment clause, nor possible in a highly complex and regulated society.[18] Rather, the principle of neutral governmental relations with religion has been identified as the fundamental objective of the establishment clause.[19] Furthermore, the religion clauses of the first amendment are read as correlative commands designed to protect individual religious liberty.[20] Because both the free exercise and establishment clauses speak in

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18. *See, e.g.*, Committee for Pub. Educ. & Relig. Liberty v. Nyquist, 413 U.S. 756, 760 (1973) ("It has never been thought either possible or desirable to enforce a regime of [complete] separation. . . ."); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) ("Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable."); Walz v. Tax Comm'n, 397 U.S. 664, 676 (1970) ("Separation in [the establishment clause] context cannot mean absence of all contact; the complexities of modern life inevitably produce some contact . . . ."); Abington School Dist. v. Schempp, 374 U.S. 203, 309 (1963) (Stewart, J., dissenting) ("We err in the first place if we do not recognize, as a matter of history and as a matter of the imperatives of our free society, that religion and government must necessarily interact in countless ways."); Zorach v. Clauson, 343 U.S. 306, 312 (1952) ("The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State."); Illinois *ex rel* McCollum v. Board of Educ., 333 U.S. 203, 255-56 (1948) (Reed, J., dissenting) ("The prohibition of enactments respecting the establishment of religion do not bar every friendly gesture between church and state. It is not an absolute prohibition against every conceivable situation where the two may work together. . . .").

19. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); Board of Educ. v. Allen, 392 U.S. 236, 249 (1968) (Harlan, J., concurring) ("The attitude of government toward religion must . . . , be one of neutrality."); Abington School Dist. v. Schempp, 374 U.S. 203, 226 (1963) ("In the relationship between man and religion, the State is firmly committed to a position of neutrality."); Engel v. Vitale, 370 U.S. 421, 443 (1962) (Douglas, J., concurring) ("The First Amendment leaves the Government in a position not of hostility to religion but of neutrality."); Zorach v. Clauson, 343 U.S. 306, 314 (1952) ("The government must be neutral when it comes to competition between sects.").

Perhaps the best description of the neutrality requirement was delivered by Chief Justice Burger in Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) (upholding property tax exemptions for religious organizations). Chief Justice Burger stated:

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

For a general discussion of the establishment clause and the substantial neutrality requirement, see Bird, *Freedom from Establishment and Unneutrality in Public School Instruction and Religious School Regulations*, 2 HARV. J.L. & PUB. POL'Y 125 (1979).

20. *See, e.g.*, Abington School Dist. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) ("These two [religion clauses] are to be read together, and in light of the single end which they are designed to serve. The basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty . . . ."); Everson v. Board of Educ., 330 U.S. 1, 40 (1947) (Rutledge, J., dissenting) (" 'Establishment' and 'free exercise' were correlative . . . ideas, representing only different facets of the single great and fundamental freedom.").

absolutes, internal tension exists between the two proscriptions; either mandate carried to its limits would tend to encroach upon the sphere of the other.[21] Governmental neutrality eases this tension and promotes the individual religious liberty guaranteed by the first amendment.[22]

To ensure neutrality, the Court has devised three tests by which establishment clause compliance is measured. First, a statute must have a purely secular legislative purpose.[23] Second, the primary effect of the statute must neither advance nor inhibit religion.[24] Finally, a statute must not foster an excessive degree of church-state entanglement. The excessive entanglement test, the most difficult of the three tests to apply in concrete situations, was first formulated by the Court in *Walz v. Tax Commission*.[25] At issue in *Walz* was the constitutionality of tax exemptions for church-owned property.[26] After determining that the exemption provision had a secular pur-

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21. *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970) ("The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to [its] logical extreme, would tend to clash with the other."); Sherbert v. Verner, 374 U.S. 398, 416 (1962) (Stewart, J., concurring) ("[I]t is the Court's duty to face up to the dilemma posed by the conflict between the Free Exercise Clause of the Constitution and the Establishment Clause as interpreted by the Court."). *See also* Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426, 428 (1963); Kauper, *Prayer, Public Schools and the Supreme Court*, 61 MICH. L. REV. 1031, 1053 (1963).

22. *See* Committee for Pub. Educ. & Relig. Liberty v. Nyquist, 413 U.S. 756, 788 (1973) ("[T]his Court repeatedly has recognized that tension inevitably exists between the Free Exercise and the Establishment Clauses, ... As a result of this tension, our cases require the State to maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion.").

23. Abington School Dist. v. Schempp, 374 U.S. 203 (1962). In *Schempp*, the Court invalidated two state statutes that required public school teachers to begin each school day with a reading from the Bible. Recognizing the interrelationship between the free exercise and establishment clauses, the Court posited this test to ensure neutral state action:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect [which] neither advances nor inhibits religion.

Id. at 222.

24. *Id.* In Committee for Pub. Educ. & Relig. Liberty v. Nyquist, 413 U.S. 756 (1973), the Court enlarged the scope of the primary effect test by interpreting it as requiring any benefit derived by religious organizations to be indirect, remote, and incidental. *Id.* at 783 n.39. For a more comprehensive discussion of the secular purpose and primary effect tests, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14(8), at 835-46 (1978) [hereinafter cited as TRIBE].

25. 397 U.S. 664 (1969).

26. *Id.* at 666-67. The tax exemption is authorized by the New York Constitution which provides:

> Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational, or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit.

N.Y. CONST. art. 16, § 1.

pose and primary effect,[27] the Court stated that a statute must also be analyzed in terms of the resulting relationship between church and state.[28] The Court identified the critical questions as whether the involvement is excessive, and whether "it is a continuing one calling for official and continuing surveillance"[29] of religious activities. The purpose of the test is to prevent "active involvement of the sovereign in religious activity."[30] Although the tax exemption in *Walz* was upheld,[31] other attacks on state aid to religious organizations have been sustained because the aid programs were found to foster excessive church-state entanglements.[32]

In addition to the tests of secular purpose, primary effect, and excessive entanglement, the Court has recently voiced yet another establishment concern. Chief Justice Burger, writing for the majority in *Lemon v. Kurtzman*,[33] stated that because "political division along religious lines was one of

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27. 397 U.S. at 672-74.

28. The Court stated: "Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion. The test is inescapably one of degree." *Id.* at 674.

29. *Id.* at 675. A direct money subsidy was cited by the Court as an example of an aid program "pregnant with involvement and . . . , encompass[ing] sustained and detailed administrative relationships for enforcement of statutory or administrative standards . . . ." *Id.*

30. *Id.* at 668.

31. The Court found that either alternative, taxation or exemption, involves some degree of entanglement. Taxation of church property, however, would involve the government in property evaluations, tax liens, and tax foreclosures. Weighing this involvement against the indirect benefit afforded churches by the exemption, the Court decided that the establishment clause did not require invalidation of the tax exemption. *Id.* at 674-75.

32. *See* Wolman v. Walter, 433 U.S. 229 (1977) (invalidating reimbursements to sectarian schools for costs of field trips); Meek v. Pittenger, 421 U.S. 349 (1975) (invalidating provision of auxiliary services, instructional materials and other educational equipment); Committee for Pub. Educ. & Relig. Liberty v. Nyquist, 413 U.S. 756 (1973) (invalidating direct money grants for maintenance and repair of sectarian school facilities); Levitt v. Committee for Pub. Educ. & Relig. Liberty, 413 U.S. 472 (1973) (invalidating state reimbursement of sectarian schools for costs of administering and grading state-prepared tests, keeping state mandated attendance records, and complying with other reporting requirements); Lemon v. Kurtzman, 403 U.S. 602 (1971) (invalidating program under which secular educational services are "purchased" from sectarian schools).

The notion of excessive entanglement has arisen almost exclusively in the context of state aid to religious elementary and secondary schools. Arguably, the notion has relevance only in that context because of the pervasively religious character of those institutions. The problem of excessive entanglement arises when "[a] comprehensive, discriminating, and continuing state surveillance" is necessary to ensure that public funds are not being used for religious purposes. Lemon v. Kurtzman, 403 U.S. 602, 616-19 (1971). The need for the surveillance does not arise, however, because of a risk that religious authorities will engage in bad faith diversion of the funds. Rather, the need arises because in some cases it is impossible to separate secular activities from sectarian ones for funding purposes. Committee for Pub. Educ. & Relig. Liberty v. Regan, 444 U.S. 646, 660-61 (1980). In those cases, the aid program is struck down as unconstitutional. For a comprehensive discussion of the excessive entanglement test, see TRIBE, *supra* note 24, § 14(12), at 865-80.

33. 403 U.S. 602 (1971). At issue in *Lemon* was the constitutionality of two statutes: a Rhode Island statute authorizing salary supplements to nonpublic teachers of secular subjects, and a

the principal evils against which the [establishment clause] was intended to protect,"[34] a statute that creates a potential for such divisiveness may be invalidated on that basis.[35] Unfortunately, the contours of the political divisiveness test, which has been subject to criticism since *Lemon*,[36] have never been clearly delineated by the Court. To date, however, no statute has been invalidated solely on the basis of its potential for political divisiveness.[37] In fact, in two recent establishment clause decisions, the Court summarily dismissed claims that the challenged statutes created political division.[38]

Throughout the development of establishment clause analysis, which has been conducted primarily in the educational arena, the Court has continually stressed two points. First, the establishment clause does not prohibit the state from financing the purely secular activities of religious groups.[39] In

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Pennsylvania statute authorizing the state to "purchase" secular educational services from nonpublic schools.

34. 403 U.S. at 622. To support his position, the Chief Justice cited an article written by Professor Paul Freund, *see* Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969), and to Justice Harlan's separate opinion in Walz v. Tax Comm'n, 397 U.S. 664, 694 (1970). Both sources provide weak support for this statement. The Freund article, for example, consists primarily of the author's opinion and is unsupported by any historical references. *See* Valente & Stanmeyer, *Public Aid to Parochial Schools—A Reply to Professor Freund*, 59 GEO. L.J. 59 (1970). Justice Harlan's remarks, on the other hand, cannot be interpreted as excluding religious organizations from the benefits derived from tax-raised funds. *See* notes 105-11 and accompanying text *infra*.

35. 403 U.S. at 624. It remains unclear from Chief Justice Burger's opinion whether the Court will invalidate an enactment solely on the basis of its potential for political division. There is, however, reason to believe that the Court would not. Apparently, only two Justices, Brennan and Marshall, believe that political division alone can serve as the basis for invalidation of a statute. In Wolman v. Walter, 433 U.S. 229 (1977), Justice Brennan, in a dissent joined by Justice Marshall, expressed his view that the large amount of money appropriated to parochial schools in Ohio "compel[led] . . . the conclusion that a divisive political potential of unusual magnitude inheres in the Ohio program. This suffices without more to require the conclusion that the Ohio statute in its entirety offends the First Amendment's prohibition against laws 'respecting an establishment of religion.' " *Id.* at 256.

36. *See* note 128 *infra*.

37. TRIBE, *supra* note 24, § 14(12), at 868.

38. In Wolman v. Walter, 433 U.S. 229 (1977), the Court upheld a state statute that authorized the provision of auxiliary services to children attending nonpublic schools. The Court rejected the claim that the program fostered political division, reasoning that any controversy provoked by the program would not focus on religion. *Id.* at 243 n.11. Similarly, in Committee for Pub. Educ. & Relig. Liberty v. Regan, 444 U.S. 646 (1980), the Court approved state reimbursement to nonpublic schools for the costs of administering and grading state mandated tests. Again the Court dismissed the claim that the statute created a divisive potential because the state reimbursed only "actual costs." *Id.* at 850 n.8.

39. *See, e.g.*, Committee for Pub. Educ. & Relig. Liberty v. Nyquist, 413 U.S. 756, 775 (1973) ("These cases simply recognize that sectarian schools perform secular, educational functions as well as religious functions, and that some form of aid may be channeled to the secular without providing direct aid to the sectarian."); Board of Educ. v. Allen, 392 U.S. 236, 245 (1968) ("[t]his Court has long recognized that religious schools pursue two goals, religious instruction and secular education"); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (Court held that education provided by Catholic schools sufficiently secular to satisfy compulsory education requirement).

Bradfield v. Roberts,[40] for example, the Court approved an appropriation to a Catholic hospital, emphasizing that the religious group was serving a purely secular function that the state had an interest in promoting.[41] Second, the principle of neutrality required that benefits generated by general public welfare legislation not be denied individuals or groups of individuals solely on the basis of their religious ties. Thus, in *Everson v. Board of Education*,[42] the Court upheld a bus fare reimbursement plan as a public welfare program designed to help transport *all* school children to and from school. Similarly, in *Board of Education v. Allen*,[43] the Court approved a state statute authorizing textbook loans to *all* school children on the basis of its character as a general welfare program. The Court has consistently recognized that the benefits that religious organizations may derive from this kind of legislation do not render the statutes constitutionally defective.[44]

In general, state attempts to aid parochial schools have been unsuccessful,[45] although limited forms of aid have been approved.[46] To survive establishment clause scrutiny, a statute must pass the tests of secular purpose, primary effect, and excessive entanglement. Neutrality, however, is the controlling principle and, therefore, general welfare programs or those designed to support the purely secular activities of religious groups are not violative of the establishment clause.

FACTUAL BACKGROUND

The Comprehensive Employment Training Act of 1973 (CETA)[47] established a general public welfare program designed to provide job training and

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40. 175 U.S. 291 (1899).

41. *Id.* at 294. The appropriation under attack was provided with the agreement that the hospital would reserve two-thirds of its beds for indigents sent by the City Commissioner. *See also* Quick Bear v. Luepp, 210 U.S. 50 (1908). In *Quick Bear*, the Court upheld congressional appropriations supporting religious schools on Indian reservations.

42. 330 U.S. 1 (1947).

43. 392 U.S. 236 (1968).

44. *See, e.g.*, Committee for Pub. Educ. & Relig. Liberty v. Nyquist, 413 U.S. 756, 771 (1973) (not every law conferring benefit to religious organizations invalid on that basis alone); Walz v. Tax Comm'n, 397 U.S. 664, 676 (1970) (benefit from public welfare legislation such as police and fire protection does not render statute unconstitutional); Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947) (purpose of establishment clause is not to handicap religious organizations by denying them the benefits of general welfare legislation).

45. *See* note 32 *supra*.

46. *See, e.g.*, Committee for Pub. Educ. & Relig. Liberty v. Regan, 444 U.S. 646 (1980) (reimbursements to sectarian schools for costs of administering and grading of state mandated tests); Wolman v. Walter, 433 U.S. 229 (1977) (therapeutic, guidance, and remedial educational services for nonpublic school children if provided off nonpublic school premises; speech, hearing, and psychological diagnostic services; standardized testing and scoring services); Board of Educ. v. Allen, 392 U.S. 236 (1968) (textbook loans for nonpublic school children); Everson v. Board of Educ., 330 U.S. 1 (1947) (bus transportation for nonpublic school children).

47. Pub. L. No. 93-203, 87 Stat. 839 (codified at 29 U.S.C. §§ 801-992 (1976)). For the purpose and legislative history of the Act, see [1973] U.S. CODE CONG. & AD. NEWS 2935. In 1978 the Act was reenacted with substantial revisions designed to provide improved employment and training services, and to extend the authorization of the Act. Comprehensive Employment and

employment opportunities for economically disadvantaged, unemployed, and underemployed persons.[48] The Act provides for a nationwide system of comprehensive employment and training services[49] administered by "prime sponsors"[50] that are primarily states and units of local government. Title II of the Act[51] authorizes a program of transitional public service employment and other manpower services[52] in areas with high unemployment rates.[53]

Under Title II, the Department of Labor allocates funds to prime sponsors pursuant to an approved comprehensive employment training plan submitted by those entities.[54] The prime sponsor may either hire the workers itself or subgrant the monies to other project applicants that may be other governmental units or private, nonprofit organizations.[55] Decisions concerning the

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Training Act Amendments of 1978, Pub. L. No. 95-524, 92 Stat. 1909 (codified at 29 U.S.C. §§ 801-999 (Supp. 1979)). For the purpose and legislative history of the reenactment and amendments, see [1978] U.S. CODE CONG. & AD. NEWS 4480.

48. The stated purpose of the Act was "to provide job training and employment opportunities for economically disadvantaged, unemployed, and underemployed persons, and to assure that training and other services lead to maximum employment opportunities and enhance self-sufficiency by establishing a flexible and decentralized system of Federal, State, and local programs." 29 U.S.C. § 801 (1976). In 1978, the objective of providing services that lead to increased earning potential of the CETA workers was stated as an additional purpose of the Act. 29 U.S.C. § 801 (Supp. III 1979). *See also* [1978] U.S. CODE CONG. & AD. NEWS 4492.

49. The several titles of CETA authorize a variety of activities such as: training, employment, counseling, testing, and placement services under Title I, 29 U.S.C. §§ 811-837 (Supp. III 1979); transitional public service employment under Title II, 29 U.S.C. §§ 841-852 (Supp. III 1979); nationally sponsored and supervised training, employment and job placement programs for such special groups as youth, offenders, older workers, persons of limited English-speaking ability, Indians, migrant and seasonal farmworkers, and others with particular labor market disadvantages under Title III, 29 U.S.C. §§ 871-886 (Supp. III 1979); intensive education, training, and counseling for disadvantaged youth under Title IV, 29 U.S.C. §§ 891-945 (Supp. III 1979); a National Commission for Manpower Policy, assigned to assess the Nation's manpower needs and goals under Title V, 29 U.S.C. §§ 951-955 (Supp. III 1979); a temporary emergency program of public service employment to help ease the impact of high unemployment under Title VI, 29 U.S.C. §§ 961-970 (Supp. III 1979); and the Young Adults Conservation Corps, which provides employment to youth who would otherwise not be productively employed, under Title VIII, 29 U.S.C. §§ 991-999 (Supp. III 1979).

50. 29 U.S.C. § 811 (Supp. III 1979).

51. 29 U.S.C. §§ 841-859 (Supp. III 1979).

52. Part D of Title II, 29 U.S.C. §§ 853-859 (Supp. III 1979), was added in 1978 to provide job training and transitional employment in areas of public service for the structurally unemployed which will lead to unsubsidized employment.

53. In order to qualify as a prime sponsor under Title II, the area in which the program is to be implemented must have an unemployment rate of at least 6.5% for three consecutive months. *See* [1978] U.S. CODE. CONG. & AD. NEWS 4482.

54. 29 U.S.C. §§ 802(20) & 856 (Supp. III 1979). In fiscal year 1977, $1,540,000 was expended under Title II, 12% of the total amount expended under the Act; 352,900 persons participated in programs authorized under Title II. *See* [1978] U.S. CODE CONG. & AD. NEWS 4491 (breakdown of funds expended during 1977 for all CETA programs).

55. 29 U.S.C. § 813 (Supp. III 1979). The comprehensive employment training plan consists of a master plan and an annual plan that serve to inform the Department of Labor of the existing economic conditions in the area and the means by which the prime sponsor intends to utilize the funds most effectively to achieve the objectives of the Act. *See* [1978] U.S. CODE CONG. & AD. NEWS 4492-95.

subgranting of funds are to be made only after comment from the community and on the basis of the project applicant's demonstrated ability to provide effective job training services.[56] Sectarian schools are statutorily excluded from participating in the CETA program as employers only to the extent that the workers are employed to operate, construct, or maintain any facility used for religious instruction or worship.[57]

In late 1978, three federal taxpayers from Wisconsin brought suit in federal district court[58] against the United States Department of Labor and various federal, state, and local governmental officials[59] seeking an injunction prohibiting the payment of CETA funds to sectarian elementary or secondary schools.[60] The plaintiffs alleged that the employment of CETA workers by the sectarian schools violated the establishment clause and the fourteenth amendment to the United States Constitution.[61] Following the issuance of a preliminary injunction, the Department of Labor promulgated regulations concerning the employment of CETA workers by sectarian schools detailing the positions that would be funded in the future.[62] The

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56. *See* 29 U.S.C. §§ 813-814, 818-820 (Supp. III 1979).

57. 29 U.S.C. § 823(a)(2) (Supp. III 1979).

58. Decker v. Department of Labor, 485 F. Supp. 837 (E.D. Wis. 1980).

59. The defendants were the United States Department of Labor, Secretary of Labor Ray Marshall, and Milwaukee County Executive William O'Donnell. The Catholic Archdiocese of Milwaukee, CETA employees Candace Warlin and John Broczek, and the Catholic Dioceses of Madison, Green Bay, LaCrosse, and Superior intervened as defendants. *Id.* at 839.

60. The plaintiffs' complaint also demanded a permanent injunction barring any further expenditures of CETA monies to fund positions in sectarian schools and that the defendants recover monies already paid to the schools. Neither the circuit court of appeals nor the district court addressed these issues.

61. 485 F. Supp. at 839.

62. 20 C.F.R. § 676.71 (1979) (current version at 20 C.F.R. § 676.71 (1981) (omitting ¶ (d))). The regulations provide that CETA workers could be employed by sectarian schools as teachers, librarians, guidance counselors, janitors, or maintenance workers, clerical workers, or teacher aides only if they came within one of the following exceptions:

> (c) Religiously affiliated elementary or secondary schools, may, subject to supervision by the prime sponsor, employ participants in programs such as adult education, recreation, summer programs or other similar activities including remedial tutorial activities, provided that such programs are not offered during regular school hours, are not a part of the regular school curriculum (including summer school), are open to the community at large, and in which the community is encouraged to participate, and provided further that such programs do not involve religious activities.
>
> (d) Nothing in this section shall preclude a prime sponsor or a subrecipient other than a religious organization from outstationing a participant to a religiously affiliated elementary or secondary school for the purpose of providing remedial education services, provided that such services do not involve religious activities and provided further that the prime sponsor or subrecipient complies with the Elementary and Secondary Education Act, 20 U.S.C. § 241(e), and the regulations thereunder at 20 C.F.R. §§ 1801 *et seq.*
>
> (e) Participants may be employed by a religiously affiliated elementary or secondary school in the following capacities, or performing functions characteristic of these capacities:

regulations permitted funding only of those positions that do not by their nature foster excessive governmental entanglement with religious affairs.[63]

After reconsideration of its injunctive order in light of the new Department of Labor regulations, the district court reaffirmed its initial decision that the entire CETA program violated the establishment clause to the extent that it allowed the placement of CETA workers in sectarian schools.[64] The court found that many of the positions funded under the new regulations did foster excessive church-state entanglement in that a comprehensive program of state surveillance would be required to ensure that the funds were not being used for religious purposes.[65] In addition, the court held that the provision of funds to the schools had the effect of directly benefiting the religious organizations because the CETA workers were, for all practical purposes, the employees of the sectarian schools.[66] Further, the method by which the CETA funds were allocated was deemed to create a serious potential for political division along religious lines that rendered the program as a whole unconstitutional.[67] The court concluded by denying the defendants' request that the injunction be limited to Milwaukee County, finding the unconstitutionality of the program to depend not on the manner in which it is administered in any particular area, but on inherent defects on the face of

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(1) Cafeteria work or other work directly related to the provision of food services to students including clerical, custodial or maintenance work related to such services.

(2) Diagnostic or therapeutic speech and hearing services including clerical work related to such services.

(3) Nursing or health services or any other activities relating to the health or safety of students (e.g., assisting on school buses or in escorting children to and from school, acting as attendance clerks or school crossing guards, removing asbestos hazards or performing other similar emergency service relating to the health or safety of students), including clerical work related to such services.

(4) Any functions (including secretarial or clerical activities) where such activities are limited to providing support services for the administration of federally funded or regulated programs made applicable to religious institutions.

(5) Functions performed with respect to the administration and grading of State-prepared examinations.

(6) Custodial child care after school hours provided the participant is not providing educational services.

63. The Regulations were worded to conform to the Supreme Court's decisions regarding the forms of aid which can be provided to religious schools. *See* notes 23-46 and accompanying text *supra*.

64. 485 F. Supp. at 842-43.

65. *Id.* at 841-42.

66. *Id.* at 843. The district court, noting that the CETA workers receive their paychecks from the Archdiocese, are hired and fired by the Archdiocese, and are subject to the daily supervision of the religious authorities, found that the workers were properly considered employees of the Archdiocese, not the federal government. Therefore, the court concluded that "[n]o matter what positions are filled by these workers, this type of direct subsidization provides the affected religious institutions with direct and tangible benefits. When such benefits are conferred out of public funds, the result is a violation of the First Amendment." *Id.*

67. *Id.*

the statute.[68] The defendants, joined by several intervenors,[69] appealed the district court's decision to the Court of Appeals for the Seventh Circuit.[70]

THE *DECKER* OPINION

The Court of Appeals for the Seventh Circuit began its opinion by briefly surveying the Supreme Court's pronouncements concerning the constitutionality of state aid to sectarian schools.[71] The tests of secular purpose, primary effect, and excessive entanglement were identified as the signposts erected by the Court to guide establishment clause analysis.[72] Because the secular legislative purpose of the CETA program was undisputed,[73] the court's analysis focused on whether the program had a primary effect which either advanced or inhibited religion, and whether it fostered an impermissible degree of governmental entanglement with the sectarian schools.[74]

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68. *Id.* at 844. It should be noted that the district court made detailed findings of fact that focused only on the operation of the CETA program in Milwaukee County and specifically on the funds allocated to the Catholic Archdiocese of Milwaukee. *Id.* at 839-41.

69. The Department of Labor appealed the district court's decision only with regard to its termination of instructional positions in adult education programs and other noninstructional positions, and amended its regulations to prohibit the outstationing of CETA workers in all other positions invalidated by the court. *See* 20 C.F.R. § 676.71(c) (1981). The intervening defendants, however, urged that all the positions in the labor regulations were constitutionally permissible. The circuit court, therefore, considered the validity of all those positions properly before it.

In addition, amicus curiae briefs were filed on behalf of the Catholic Bishop of Chicago, and also on behalf of the Agudath Israel of America, the National Jewish Commission on Law and Public Affairs, the National Council of Young Israel, Torah Umesorah, and the Union of Orthodox Jewish Congregations of America.

70. Decker v. O'Donnell, Nos. 80-1230, 1231 & 1264 (7th Cir. Sept. 9, 1980).

71. Decker v. O'Donnell, Nos. 80-1230, 1231 & 1264, slip op. at 9-17 (7th Cir. Sept. 9, 1980). The court acknowledged establishment clause analysis as "one of the murkier regions of constitutional law."

72. *Id.* at 9-11. The court stated that these tests "are designed to protect against the primary evils of government's sponsorship, financial support, and active involvement of the sovereign in religious activity, ..." *Id.* Rejecting the defendant's argument that the character of the CETA program as a general welfare program justified a less stringent standard of review, the court held that these tests apply in all establishment clause cases regardless of the nature of the challenged statute. *Id.* at 10 n.13.

The court also delineated the contents of each of the tests. The effect test was deemed to require that any benefit to religious organizations be remote, incidental, and indirect. The excessive entanglement test was broken down into two components: administrative entanglement and political entanglement. The court also identified three factors to be considered in determining whether an aid program would foster excessive administrative entanglement: "(1) the character and purposes of the benefitted institutions, (2) the nature of the aid provided, and (3) the resulting relationship between the State and the religious authority." *Id.* at 11 (citing Roemer v. Board of Pub. Works, 426 U.S. 736, 748 (1976)).

73. Decker v. O'Donnell, slip op. at 12.

74. *Id.* at 16. Before commencing its analysis, the *Decker* court identified four characteristics common to the positions permitted under the Department of Labor regulations. First, the institutions were primarily religious primary and secondary schools. Second, the CETA workers were more properly considered employees of the schools than of the federal government because they were subject to the daily supervision of the school authorities. Third, the CETA program

The *Decker* court examined each position permitted under the Department of Labor regulations individually to determine whether the establishment clause requirements had been met.[75] The provisions permitting the outstationing of CETA workers as remedial educational instructors,[76] summer recreational instructors,[77] adult educational instructors,[78] custodial child care workers,[79] speech and hearing therapists and diagnosticians,[80] health and safety workers,[81] or as administrators and graders of state-prepared tests[82] were all invalidated by the court on excessive entanglement grounds.

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did not require that public schools receive comparable assistance. Finally, the parochial schools received a relatively low proportion of all CETA workers under Title II. *Id.* at 12.

Of these four characteristics, the court considered the nature of the schools the most significant factor in its analysis. Because the religious elements in those schools are pervasive, the court stated that it is extremely difficult to aid only the sectarian activities without conducting a continuing state surveillance. *Id.* at 12-14.

75. *Id.* at 17-28. The *Decker* court justified its position by reference to the Supreme Court's decision in Hunt v. McNair, 413 U.S. 734 (1973). In *McNair*, the Court upheld state funded construction of buildings and facilities at institutions of higher learning. The Court's analysis focused not on the effect of the program as a whole, but on the program as it affected sectarian colleges and universities. *Id.* at 742. This kind of analysis is not analogous to that conducted in *Decker* where the court took the "focus" one step further from the effect of the program on the sectarian schools to the effect of each position.

76. Decker v. O'Donnell, slip op. at 17-18. The *Decker* court relied on Meek v. Pittenger, 421 U.S. 349 (1975), to prohibit CETA funding for workers in remedial instruction positions. In *Meek*, the Court held that the provision of auxiliary services by public employees on nonpublic school premises would require a continuing state surveillance to ensure that the CETA workers did not inadvertently convey religious beliefs. *Id.* at 367-72. This risk is minimized under the CETA program because the Act prohibits hiring on the basis of religious affiliation. 29 U.S.C. § 834(a) (Supp. III 1979). Thus, the CETA worker providing the services would not have been of the same religious faith as the student in every instance. Under these circumstances, no amount of sectarian influence would be likely to cause the CETA worker to inculcate religious beliefs to which he does not adhere.

77. Decker v. O'Donnell, slip op. at 18-19.

78. *Id.* at 20-21. The Supreme Court consistently has approved state aid programs for colleges and universities despite inclusion of sectarian institutions as beneficiaries. *See, e.g.*, Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (upholding state grants to institutions of higher learning); Hunt v. McNair, 413 U.S. 734 (1973) (upholding state issuance of revenue bonds to finance construction of college and university facilities); Tilton v. Richardson, 403 U.S. 672 (1971) (upholding federal construction grants for college and university facilities). This aid has been upheld on the ground that religious indoctrination is not a primary objective of these institutions and, thus, a high level of academic freedom prevails. *See* Roemer v. Board of Pub. Works, 426 U.S. 736, 750-51 (1976). The *Decker* court rejected the argument that the age and mental ability of an adult precluded the risk of religious indoctrination stating that "it is not always ensured that adult education courses will match the nondoctrinaire intellectual atmosphere of the colleges. . . ." Decker v. O'Donnell, slip op. at 20.

79. *Id.* at 21. The court found the risk of excessive entanglement in providing custodial child care workers because "the line between serving as a guardian of the safety of the children and taking a caring, parental role toward one's charges is one that in practice will be virtually impossible for a CETA worker, even in good faith, to observe strictly." *Id.*

80. *Id.* at 22-23. *See also* notes 124-25 and accompanying text *infra*.

81. Decker v. O'Donnell, slip op. at 23-24.

82. *Id.* at 24-25.

The court found that the pervasively religious nature of the schools would necessitate a comprehensive, discriminating, and continuing state surveillance of each position to ensure that the CETA workers were not engaging in prohibited religious activities.[83] Other positions, such as cafeteria and maintenance workers, as well as some clerical positions, were found to pass both the effect and excessive entanglement tests because those positions are sufficiently secular in nature to ensure compliance with establishment clause restrictions on state aid to sectarian schools without state surveillance.[84]

Although some positions passed both the effect and entanglement tests, the *Decker* court nevertheless held that the establishment clause prohibited the employment of CETA workers by sectarian schools in any capacity because "the structure of decisionmaking about funding creates an impermissible risk of political entanglement for the CETA program as a whole."[85] Rejecting the defendants' argument that a potential for political divisiveness serves only as a warning signal of a constitutional violation, the *Decker* court interpreted *Lemon v. Kurtzman* and its progeny as holding that such potential itself constitutes an establishment clause violation.[86] The potential for political division was found to be seriously increased by the limited availability of CETA funds, the annual nature of the appropriations, and the requirement that funding decisions be made only after an opportunity for comment from the local community.[87] The court feared that parochial school proponents would exert political pressure on the officials responsible for making the funding decisions, and thus create division along religious lines.[88]

The *Decker* court concluded by affirming the district court's denial of the defendants' request that the injunction be limited to Milwaukee County.[89] Because it found the CETA program facially unconstitutional, the court declared that the injunction be permanent and nationwide.[90]

Criticism of the *Decker* Court's Analysis

The *Decker* court's analysis is subject to criticism on three grounds. First, by failing to recognize the CETA program as general social welfare legislation, the *Decker* court reached a conclusion that undermines the establishment clause principle of governmental neutrality and places a constitutional

83. *See* notes 76-82 *supra*.

84. Decker v. O'Donnell, slip op. at 26-28. The court found that the only clerical positions that passed the effect and administrative entanglement tests were those connected with food services and safety-related school transportation services. *Id. See also* notes 120-21 and accompanying text *infra*.

85. *Id.* at 28-29.

86. *Id.* at 29 n.34.

87. *Id.* at 30-31.

88. *Id.* at 31-32. *See also* notes 126-42 and accompanying text *infra*.

89. Decker v. O'Donnell, slip op. at 32-34. The *Decker* court countered the defendants' objections to the nationwide injunction by stating that its analysis had focused primarily on the language of the Act and the accompanying regulations and that the evidence of Milwaukee County practices was used merely as an illustration.

90. *Id.* at 1.

cloud over similar types of aid programs. Second, the *Decker* court applied the test of excessive entanglement too strictly and thereby reached results with respect to particular positions inconsistent with prior establishment clause decisions. Finally, the *Decker* court's invalidation of the CETA program on the basis of its perceived potential for political division is unsupportable by Supreme Court precedent and deprives communities of one of their most valuable sources of social welfare services.

The CETA Program as Social Welfare Legislation

Throughout the Nation's history, religious organizations have administered to the secular needs of their communities by providing valuable social welfare services.[91] Church groups and religious orders have established and maintained hospitals, nursing homes, orphanages, and counseling centers; jobs, food, and emergency housing have also been provided.[92] Initially, religious organizations relied solely on the generosity of their members to finance these social welfare services.[93] As the economy declined and the problems associated with the rapid growth of our country proliferated, the government expanded its reach into the area of social welfare.[94] Because private, charitable groups were already equipped with facilities and trained personnel, the state found that it could effectively advance its social welfare interests by contracting to buy these services from them.[95] Religious and nonreligious groups alike have shared in what is, in effect, direct governmental subsidization of their social welfare programs.[96] Provision of financial assistance to these charitable organizations is motivated by mounting de-

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91. *See generally* B. COUGHLIN, CHURCH AND STATE IN SOCIAL WELFARE 133-37 (1965). [hereinafter cited as COUGHLIN]. The Supreme Court itself explicitly recognized the contributions to social welfare made by religious organizations when it stated: "We find it unnecessary to justify the tax exemption on the social welfare services or 'good works' that some churches perform for parishioners and others—family counselling, aid to the elderly and the infirm, and to children." Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (upholding real property tax exemptions for religious organizations).

92. COUGHLIN, *supra* note 91, at 133-37. *See also* Amicus Curiae Brief for the Catholic Bishop of Chicago at 1-3, Decker v. O'Donnell, Nos. 80-1230, 1231 & 1264 (7th Cir. Sept. 9, 1980).

93. COUGHLIN, *supra* note 91, at 136.

94. *See generally* L. DAVIS, AMERICAN ECONOMIC GROWTH 658-62 (1972). The Great Depression was one of the most significant factors prompting governmental intervention in the social welfare area. The state and private organizations, themselves struggling with the failing economy, were simply unable to accommodate the demands placed upon them by the unprecedented number of unemployed. By 1938, federal expenditures for public welfare services had increased to 25 times the amount expended in 1902. *Id.* at 661. *See also* Amicus Curiae Brief for the Catholic Bishop of Chicago at 2-3.

95. COUGHLIN, *supra* note 91, at 134-38.

96. The Catholic Bishop of Chicago argued that "[t]oday, a religious organization, like any other social service agency, cannot effectively provide social services to the disadvantaged without some contact, be it regulation, assistance, or approval, with the State." Amicus Curiae Brief for the Catholic Bishop of Chicago at 2.

mands for state financed welfare assistance and recognition that these private groups can often provide more effective welfare services than can a bureaucratic, impersonal government.[97] Today there are many instances of direct state support of the welfare programs of churches and religious organizations.[98]

The CETA program represents an arrangement between government and private, nonprofit organizations to provide social services. Under CETA, the Department of Labor allocates funds to prime sponsors who may enlist the assistance of private groups that have demonstrated an ability to deal effectively with the hardcore unemployed.[99] The Catholic Church is merely one such organization that has provided successful job training and employment opportunities in the past.[100] By denying federal funds to church-related institutions for their secular job training endeavors, the *Decker* court has ignored the fundamental establishment clause principle requiring governmental neutrality between religion and nonreligion, and has raised serious questions concerning the validity of governmental funding of other church-sponsored welfare programs.

Moreover, judicial interpretations of the establishment clause support an analysis contrary to that reached by the *Decker* court. The tests of secular purpose, primary effect, and excessive entanglement were designed as means by which signs of either governmental support of religion or governmental hostility toward religion could be detected.[101] Either governmental stance threatens the religious liberty protected by the first amendment. The *Decker* court was correct in observing the "signposts" erected by the Supreme Court to guide establishment clause analysis. The objection, however, lies with the framework in which the tests were applied. The *Decker* court analyzed the CETA program as though it represented yet another legislative attempt to aid the educational function of sectarian institutions, an area concededly fraught with difficulty because of the intermingling of secular and religious instruction by those institutions.[102] Overlooked by the *Decker* court was the substance of the relationship between church and state arising under the CETA program. The intended beneficiaries of the CETA program are not the religious organizations, but the CETA workers who lack the job skills

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97. *See* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part II. The Nonestablishment Principle,* 81 HARV. L. REV. 513, 555 (1968) [hereinafter cited as Giannella].

98. Examples include federal grants for hospital construction under the Hill-Burton Act, 42 U.S.C. §§ 291-2910 (1976 & Supp. III 1979), federal grants under Title II of the Economic Opportunity Act for various community action projects conducted by religious groups, 42 U.S.C. §§ 2781-2831 (1976 & Supp. III 1979), or public grants to religious orphanages for the care and maintenance of wards of the state.

99. *See* note 55 and accompanying text *supra.*

100. In Chicago, for example, the Catholic Archdiocese of Chicago had the highest percentage of exemplary job sites and in many areas the highest rate of success in placing its trainees in permanent jobs. *See* Amicus Curiae Brief for the Catholic Bishop of Chicago at 2.

101. *See* notes 23-32 and accompanying text *supra.*

102. *See* note 32 and accompanying text *supra.*

necessary to obtain unsubsidized employment. The structure of the CETA program, moreover, encourages an alliance between the state and private groups for the purpose of providing needed job training and employment opportunities. Because the provision of these services represents a secular activity, all entities applying for CETA funds should be considered without regard to their religious affiliation.[103] A contrary result would indicate a governmental preference for secularism, a position equally deleterious to the religious freedom guaranteed by the first amendment.[104]

Earlier decisions of the Supreme Court support the proposition that religious organizations may share in the benefits generated by public welfare legislation even though it may be impossible to ensure that the religious activities of those organizations are not incidentally benefited.[105] For example, in *Walz v. Tax Commission*[106] the Court upheld a New York constitutional provision exempting religious organizations from payment of real property taxes. Because the provision also exempted other nonprofit and charitable organizations "consider[ed] . . . , as beneficial and stabilizing influences in community life,"[107] the Court found that nothing in the establishment clause required that religious organizations be denied privileges accorded other similar institutions.[108] Mr. Justice Harlan, in a separate opinion, viewed the critical question as "whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious

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103. *See* Giannella, *supra* note 97, at 554-60. *See also* Everson v. Board of Educ., 330 U.S. 1, 16 (1947) (recognizing the state's right to extend the benefits of its public welfare legislation to all its citizens without regard to religious affiliation despite incidental benefits derived by sectarian institutions).

104. *See* Meek v. Pittenger, 421 U.S. 349, 395 (1975) (Rehnquist, J., dissenting) ("The Court . . . believes that the Establishment Clause of the First Amendment not only [requires] religious neutrality on the part of government but also requires that this Court go further and throw its weight on the side of those who believe that our society . . . should be a purely secular one."). *See also* Louisell, *Does the Constitution Require a Purely Secular Society?* 26 CATH. U.L. REV. 20 (1976) (author decries recent Supreme Court decisions as requiring the government to promote secularism in all state-related activities); Toscano, *A Dubious Neutrality: The Establishment of Secularism in the Public Schools*, 1970 B.Y. L. REV. 184, 211 n.108 ("When governmental welfare was not the order of the day, aid to religion was much less defensible. Today, when government benefits and entitlements are provided to nearly everyone, to deny only theists such aid is an unjustifiable discrimination that makes competition between theism and secularism virtually impossible.").

105. *See* notes 42-44 and accompanying text *supra*.

106. 397 U.S. 664 (1971).

107. *Id.* at 673.

108. *Id.* at 672-73. The Court stated:

> [The state] has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups.

Id.

institutions could be thought to fall within the natural parameters."[109] In such cases, neutrality prohibits the government from engaging in what he termed "religious gerrymander[ing]."[110] Therefore, according to the Supreme Court the establishment clause does not require that religious organizations be excluded from sharing in the benefits of legislation designed to benefit a broad class of private, nonprofit groups nor to receive state aid for their purely secular welfare activities.[111]

The Decker *Court's Application of the Excessive Entanglement Standard*

The *Decker* court invalidated several positions permitted under the labor regulations on excessive entanglement grounds.[112] Because the *Decker* court improperly applied the excessive entanglement standards too strictly, many of the findings with respect to particular positions are inconsistent with recent Supreme Court decisions upholding state provision of services identical or substantially similar to those provided by CETA workers.

The determination that a statutory aid program creates excessive entanglement is "inescapably one of degree."[113] Complete state noninvolvement with religious organizations is neither required nor possible in a highly regulated society.[114] Accordingly, the Supreme Court has recognized that "[f]ire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts."[115] Church-state entanglement becomes excessive primarily in the context of state aid to religious elementary and secondary schools.[116] Although the Court has repeatedly stressed that a state may finance secular functions performed by religious institutions, in some in-

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109. *Id.* at 696 (Harlan, J., separate opinion). Justice Brennan, concurring in the *Walz* decision, viewed the establishment clause as prohibiting those aid programs that "(a) serve the essentially religious activities of religious [organizations]; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means . . . , where secular means would suffice." *Id.* at 680. He concluded, however, that the tax exemptions did not violate the establishment clause because the religious organizations were "among a range of other private, nonprofit organizations [that] contribute to the well-being of the community in a variety of nonreligious ways, and thereby bears burdens that would otherwise . . . be left undone, to the detriment of the community." *Id.* at 687.

110. *Id.* at 696.

111. *See* notes 39-44 and accompanying text *supra*. *See also* Abington School Dist. v. Schempp, 374 U.S. 203, 301 (1963) (Brennan J., concurring) ("If religious institutions benefit, it is in spite of rather than because of their religious character. For religious institutions simply share [the] benefits which government makes generally available to educational, charitable, and eleemosynary groups.").

112. *See* notes 76-84 and accompanying text *supra*.

113. Walz v. Tax Comm'n, 397 U.S. 664, 674 (1971).

114. *See* note 18 and accompanying text *supra*. *See also* Roemer v. Board of Pub. Works, 426 U.S. 736, 745 (1976) ("A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church.").

115. Lemon v. Kurtzman, 403 U.S. 602, 614 (1970).

116. *See* note 32 and accompanying text *supra*.

stances it may be impossible to separate these secular functions from religious ones without conducting a "comprehensive, discriminating, and continuing surveillance"[117] to ensure that the funds are not inadvertently used to advance religious beliefs.[118] The notion of excessive entanglement, however, does not involve the risk that religious officials will engage in bad faith diversion of public funds; rather, the problem arises when the state no longer supplies a readily separable secular aid program.[119]

The *Decker* court failed to recognize the excessive entanglement test as one of degree and seemed to require absolute assurance that some services provided by the CETA workers would not further, even incidentally, religious practices or beliefs. In its discussion of adjunct custodial or maintenance services related to cafeteria work, for example, the *Decker* court rejected the claim that those positions could be held by CETA workers because they were essentially secular and nonidealogical in nature.[120] Instead, the *Decker* court found that these positions would occasionally require the handling of religious insignia such as at father-son banquets and breakfasts in honor of the Archbishop.[121] The *Decker* court also invalidated the placement of CETA workers as nurses because the regulations did not exclude "services treating high school children on matters of sexuality, sexual hygiene, and mental health."[122] Because the possibility existed, albeit slight, that nurses might inculcate religious values in these areas, the court found that continuing surveillance would be necessary to ensure compliance with establishment clause restrictions.[123]

The *Decker* court also erred by invalidating some positions indistinguishable from those previously upheld by the Supreme Court. For example, the *Decker* court found that the placement of CETA workers as speech and hearing diagnosticians fostered excessive entanglement. Although the court

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117. Lemon v. Kurtzman, 403 U.S. 602, 619 (1970).

118. *Id.* The *Lemon* Court struck down a state statute authorizing salary supplements to teachers of secular subjects in sectarian schools on excessive entanglement grounds because it found that "[u]nlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment." *Id.*

119. *See* Committee for Pub. Educ. & Relig. Liberty v. Regan, 444 U.S. 646, 660-61 (1980) ("[W]e are not prepared to read into the plan as an inevitability the bad faith upon which any future excessive entanglement would be predicated."); Wolman v. Walter, 433 U.S. 229, 247 (1977) ("The danger [of excessive entanglement] exists there, not because the public employee was likely deliberately to subvert his task to the service of religion, but rather because the pressures of the environment might alter [its] behavior from its normal course."). *See also* TRIBE, *supra* note 24, at 890.

120. Decker v. O'Donnell, Nos. 80-1230, 1231 & 1264, slip op. at 27 (7th Cir. Sept. 9, 1980).

121. *Id.*

122. *Id.* at 23.

123. *Id.* By invalidating the outstationing of CETA workers in positions relating to health and safety, the *Decker* court completely disregarded the finding of the Supreme Court that there exists a "class of general welfare services for children that may be provided by the State regardless of the incidental benefit that accrues to church-related schools." Meek v. Pittenger, 421 U.S. 349, 371 n.21 (1975).

acknowledged that the Supreme Court, in *Wolman v. Walter*, approved a statutory program authorizing public employees to provide these same services in sectarian institutions, it found these services distinguishable because they were provided as part of a "circuit-riding" program.[124] Yet nothing in the *Wolman* opinion indicated that the Court relied on this factor in upholding the aid program in question. Instead, the Court stressed that the risk of intrusion of religious beliefs was minimized because the diagnostician had limited contact with *particular* students, not because little time was spent in the religious schools.[125]

The Decker *Court's Use of the Political Divisiveness Test*

The *Decker* court also erred in invalidating the CETA program on the basis of what the court perceived as a potential for political divisiveness.[126] Neither the *Lemon* decision nor subsequent establishment clause cases support the proposition relied upon by the *Decker* court that political divisiveness can alone warrant invalidation of a statute that otherwise survives establishment clause scrutiny.[127] Since *Lemon*, commentators have criticized the remarks of Chief Justice Burger regarding the evils of political division along religious lines.[128] Some have interpreted these remarks as prohibiting all forms of political activity by religious organizations and have criticized the notion as

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124. Decker v. O'Donnell, slip op. at 22 (citing Wolman v. Walter, 433 U.S. 229 (1977)).

125. The *Wolman* Court stated:

> The reason for considering diagnostic services to be different from teaching or counseling is readily apparent. First, diagnostic services, unlike teaching or counseling, have little or no educational content and are not closely associated with the educational mission of the nonpublic school. Accordingly, any pressure on the public diagnostician to allow the intrusion of sectarian views is greatly reduced. Second, the diagnostician has only limited contact with the child, and that contact involves chiefly the use of objective and professional testing methods to detect students in need of treatment. The nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student.

433 U.S. at 244.

126. *See* text accompanying notes 85-88 *supra*.

127. *See* notes 136-38 and accompanying text *infra*.

128. *See, e.g.*,Clark, *Comments on Some Policies Underlying the Constitutional Law of Religious Freedom*, 64 MINN. L. REV. 453, 534 (1980) (argues that religious conflict is no more deleterious than other kinds of political conflict); Fink, *The Establishment Clause According to the Supreme Court: The Mysterious Eclipse of Free Exercise Values*, 27 CATH. U.L. REV. 207, 259 (1978) (suggests the application of political divisiveness test creates more conflict, not less); Kauper, *Public Aid for Parochial Schools and Church Colleges: The Lemon, Dicenso and Tilton Cases*, 13 ARIZ. L. REV. 567, 588 (1971) (argues political divisiveness test inhibits free exercise of religion); Toscano, *A Dubious Neutrality: The Establishment of Secularism in the Public Schools*, 1979 B.Y. L. REV. 177, 194-96 (criticizes political divisiveness test as infringing on rights of free exercise, free association, free speech, and free press); Weber, *School Aid and Political Divisiveness*, 38 JURIST 203, 206-08 (1978) (suggesting that legislatures, rather than courts, are proper forums to resolve religious conflict).

an impermissible burden on the free speech and participation rights of these organizations in the political process.[129]

As interpreted by the *Decker* court, the potential for political divisiveness effectively precludes religious groups from seeking to secure governmental funding for their secular as well as sectarian activities. The notion of political divisiveness, however, has been deemed relevant only when religious groups seek governmental funding for their religious activities.[130] In *Wolman v. Walter*,[131] the Court rejected the plaintiffs' claim that the challenged aid program created an impermissible risk of political divisiveness, reasoning that the resulting conflict would not focus on religion because the aid provided was essentially secular in nature.[132] The *Wolman* court thereby explicitly recognized that all political debate among or participated in by religious groups is not constitutionally suspect but only that debate which centers on governmental funding for religious activities. Therefore, the *Decker* court erred in applying the political divisiveness test in a situation where funding was sought for purely secular welfare activities.

The *Decker* court's erroneous application of the political divisiveness test adversely effects both the ability of religious groups to provide effective welfare services[133] and the efficient allocation of state funds in the social welfare sphere. Under the CETA program, funding decisions are made on the basis of an applicant's demonstrated ability to train and place the unemployed;[134] religious values or beliefs play no role in the decision making process. To deny eligibility to religious groups on the basis of their character as such deprives the community of what historically has been one of the most fertile sources of welfare services.[135]

In addition, the *Decker* court placed excessive analytical weight on the risk of political divisiveness in scrutinizing the CETA program. According to the *Decker* court, if a statute fosters division along religious lines, it can be invalidated on that basis alone even if it otherwise passes the tests of secular

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129. It is clear, however, that the Court did not mean to suppress the political activities of religious groups on all issues. The *Walz* Court acknowledged that "[a]dherents of particular faiths and individual churches frequently take strong positions on public issues including . . . , vigorous advocacy of legal or constitutional positions." The Court was quick to add, however, that "churches as much as secular bodies and private citizens have that right." Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970).

130. *See* L. PFEFFER, GOD, CAESAR, AND THE CONSTITUTION 55-63 (1975); TRIBE, *supra* note 24, § 14-12 at 867. *See also* Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970) (recognizing right of religious groups to engage in legislative advocacy).

131. 433 U.S. 229 (1977).

132. *Id.* at 243 n.11. The *Wolman* Court stated that "the Ohio program is . . . not susceptible to the intrusion of sectarian overtones. *Since it is not likely to be seen as involving aid to religion*, any controversy it provokes will not focus on religion. In fact, it is hard to believe that religious controversy would be generated by the offer of uniform health services for all school children." *Id.* (emphasis added).

133. *See* note 96 *supra*.

134. *See* note 55 and accompanying text *supra*.

135. *See* notes 91-98 and accompanying text *supra*.

purpose, primary effect, and excessive entanglement.[136] As previously noted, political divisiveness has never played such a decisive role in the Supreme Court's establishment clause analysis.[137] Instead, the Supreme Court has characterized political divisiveness as a "warning signal" of some future establishment clause violation rather than as an independent constitutional infirmity.[138] By erroneously elevating political divisiveness to the status of an additional establishment clause test, the *Decker* court seriously impaired the right of religious groups to compete for governmental funding for their social welfare activities along with other charitable organizations.

Finally, the *Decker* court based its decision on what it determined to be the program's *potential* for political division rather than on actual, demonstrated political conflict.[139] The Archdiocese of Milwaukee, however, had been receiving CETA funds since 1977, and presumably such conflict would have surfaced by the time of the *Decker* litigation.[140] Yet neither the court nor the plaintiffs pointed to any evidence of such conflict among the applicants or in the community. Instead, the *Decker* court found that the annual nature of the funding process and the requirement that decisions be made only after community comment created an impermissible *risk* of religious conflict.[141] The legislature, however, rather than the judiciary, is the proper forum to assess the degree of conflict generated by prospective litigation and to channel this conflict in a manner that acheives optimal results.[142] By attempting to gauge the degree of political conflict likely to

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136. Decker v. O'Donnell, Nos. 80-1230, 1231 & 1264, slip op. at 29 n.34 (7th Cir. Sept. 9, 1980).

137. *See* notes 37-38 and accompanying text *supra*.

138. Committee for Pub. Educ. & Relig. Liberty v. Nyquist, 413 U.S. 756, 797-98 (1973) (indicating that "while the prospect of [political] divisiveness may not alone warrant the invalidation of state laws that otherwise survives the careful scrutiny required by the decisions of this Court, it is certainly a 'warning signal' not to be ignored"); Lemon v. Kurtzman, 403 U.S. 602, 624-25 (1971) (political entanglement constitutes a "warning signal" of "an evitable progression leading to the establishment of state churches and state religion").

139. Decker v. O'Donnell, slip. op. at 30-32.

140. *Id.* at 4. In its amicus curiae brief, the Catholic Bishop of Chicago stated that the City had requested the Chicago Archdiocese to participate in the CETA program, and indicated that "[t]here has not been nor can we envision a divisive scramble here for federal monies to serve the poor." *Id.* at 6.

141. *Id.* at 30-32.

142. *See* Weber, *School Aid and Political Divisions*, 38 JURIST 203, 206-08 (1978). Weber asserts that the judiciary is improperly equipped to handle conflict arising from differing religious views; he argues that it is precisely in the legislatures that such conflicts must be resolved. *See also* Kauper, *Public Aid For Parochial Schools and Church Colleges: The Lemon, Dicenso and Tilton Cases*, 13 ARIZ. L. REV. 567 (1971). Kauper argues as follows:

> If the Court is going to use its judicial power through interpretation of the establishment clause to foreclose from the realm of public debate and the legislative process any measures which will excite division along religious lines, it will be embarking on a dubious journey. If institutions and groups feel that it is unjust to withold public funds from private schools, this feeling will not be excised by judicial decree.

Id. at 589.

arise under the CETA program, the *Decker* court improperly usurped the function of the legislature.

Conclusion

The decision of the *Decker* court may have a wide ranging impact both on the structure of state-financed social welfare activities and on the continuing development of establishment clause analysis. The *Decker* court's refusal to recognize the unique church-state relationship arising under the CETA program and to alter its analysis accordingly casts considerable doubt on the constitutionality of similar church-sponsored welfare programs.

Concededly, the neutral course charted by the first amendment has not always been an easy one to locate and has been badly blurred due to a wavering Supreme Court attitude. But the *Decker* court's decision represents such a sharp departure from the benevolent neutrality that promotes religious freedoms that future judicial responses in this area will be impossible to predict. This threat of unpredictability is further enhanced by the *Decker* court's interpretation and consequent application of the political divisiveness test which can accurately be labelled "the fourth establishment clause test" in the Seventh Circuit.

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